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No. 80-515

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

W. C. YORK,

Petitioner,

v.

FEDERAL HOME LOAN BANK AND FEDERAL SAVINGS AND LOAN INSURANCE CORP.,

Respondents,

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF RALEIGH,

Intervenor-Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR INTERVENOR-RESPONDENT IN OPPOSITION

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BRIEF FOR INTERVENOR-RESPONDENT IN OPPOSITION

QUESTION PRESENTED[1]

1. Whether the Petitioner, as a member/depositor of First Federal Savings and Loan Association of Raleigh, is deprived of any property right or interest protected by

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[1]The QUESTIONS PRESENTED under the Petition do not adequately raise the question of the statutory authority of the FHLBB to approve the conversion of First Federal pursuant to Sec. 402(j)(4) of the National Housing Act (12 U.S.C. 1725(j)). For purpose of this Opposing Brief, the question of statutory authority to approve the conversion is not considered as subject to review by the Supreme Court Rule 21.1(a).

the Fifth Amendment to the Constitution of the United States by reason of its conversion from a federal mutual to federal stock association pursuant to Regulations (12 C.F.R. §563b.1 *et seq.*) of the Federal Savings and Loan Insurance Corporation?

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The Petition for Writ of Certiorari involves pertinent sections of the Home Owners' Loan Act of 1933, as amended, 12 U.S.C. §1464 *et seq.* (Section 1725(j)) and the regulations of the Federal Home Loan Bank Board and of the Federal Savings and Loan Insurance Corporation promulgated thereunder (12 C.F.R., Sections 544, 545, 552 and 563b.1 *et seq.*)

STATEMENT OF THE CASE

Petitioner, as a member/depositor of First Federal Savings and Loan Association of Raleigh ("First Federal"), the Intervenor-Respondent, seeks a review of action taken by the Federal Home Loan Bank Board ("FHLBB"), acting as the operating head of the Federal Savings and Loan Insurance Corporation ("FSLIC"), the Respondents herein and both agencies of the United States Government charged with the responsibility of regulating federally insured savings and loan associations. Such review of action taken by the Respondents involves the approval of First Federal's conversion from a mutual to stock form of association while retaining its federal charter pursuant to the FSLIC's regulations, Section 563b.1 *et seq.*

First Federal was initially chartered by the FHLBB on September 8, 1937 as a federal mutual savings and loan association. By modification of its original charter effective

on February 5, 1952, First Federal has since operated under the form of Charter N (12 C.F.R. Section 544.1) until the adoption of Charter S (12 C.F.R. Section 552.2) through the process of First Federal's conversion from a mutual to stock form of federal association which was concluded on September 6, 1979.

The conversion of First Federal from a mutual to stock form of federal association was accomplished through First Federal's application initially filed with the FHLBB on October 17, 1978 pursuant to the conversion regulations of the FHLBB (12 C.F.R. Section 563b.1) and the included Plan of Conversion adopted by the Board of Directors of First Federal. As subsequently amended by action taken by the Board of Directors through May 10, 1979, the application for conversion and the included Plan of Conversion was approved by the FHLBB (Resolution Number 79-298) on May 17, 1979, subject to a compliance with certain conditions including, among others, the approval of the Plan of Conversion by at least a majority of the votes eligible to be cast, in person or by proxy, by the members of First Federal at a meeting at which the Plan of Conversion is submitted for their approval. (12 C.F.R. Section 563b.6) At the meeting of members held on June 29, 1979 the Plan of Conversion was approved by 1,213,156 votes in favor of conversion, or 71.6% of the votes eligible to be cast, and only 100,850 votes, or 5.9% of those eligible to be voted, were cast against the conversion. Prior to the FHLBB's approval of the conversion (Resolution No. 79-298), the FHLBB had considered and rejected the Petitioner's written objections to the conversion.[2]

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[2]Exhibits B(1) and B(2) to the Petition for Review (Complaint filed in the United States District Court for the Eastern District of North Carolina (No. 79-254-CIV-5)).

Thereafter, pursuant to 12 U.S.C. §1725(j)(4) and 12 U.S.C. §1730a(k), the Petitioner applied directly to the United States Court of Appeals for the Fourth Circuit for a review of the action of the FHLBB approving the conversion. The Petitioner's grounds for review were set forth under the form of the complaint which Petitioner had filed in a civil action instituted on June 19, 1979 in the United States District Court for the Eastern District of North Carolina (No. 79-354-CIV-5). Such civil action was brought by the Petitioner against the Respondents, First Federal and its directors challenging the legality of the conversion. First Federal's motion to intervene in the review before the Court of Appeals was allowed on October 27, 1979. By Order of the Court of Appeals entered on September 27, 1979, Petitioner's motion to stay the review in the Court of Appeals was dismissed. The civil action now pending in the District Court has been held in abeyance pending further orders of that Court.

On July 1, 1980, the Court of Appeals issued its decision which concluded that the approval of First Federal's conversion was within the discretion of the FHLBB, was neither arbitrary nor capricious, and the action of the FHLBB approving the conversion was affirmed.

SUMMARY OF ARGUMENT

The question before the Supreme Court on certiorari is directed to a consideration of the extent of a member/depositor's interest in a federally chartered mutual savings and loan association. The cited court decisions relied on by the Petitioner describe that interest, for certain limited purposes, as one similar to that of a stockholder in the ordinary corporation. At best, the legal status of a mem-

ber/depositor in a mutual savings and loan association is *sui generis* having characteristics partaking of both a creditor and stockholder relationship. However, a consideration of the basic question which the Petitioner raises is directed to whether or not the interest of a member/depositor of a mutual savings and loan association, however labeled, is extensive enough to represent a property interest in a constitutional sense entitled to any of the protective safeguards afforded by the Fifth Amendment to the Constitution.

The Petitioner's formal objections to the conversion of First Federal from a mutual to stock form of association focus upon his assertion that the conversion deprives him of a property interest "without just compensation" contrary to the Fifth Amendment. In this, Petitioner apparently relies on that provision precluding any "taking of property for public use without just compensation." Petitioner's reliance on this provision of the Fifth Amendment is misplaced since under no circumstance has there been a *direct appropriation* by the Federal government through the instrumentalities of the FHLBB or the FSLIC of any asserted property interest of the Petitioner. If Petitioner's objection under the Fifth Amendment encompasses a claim of deprivation of property contrary to the due process clause, such an objection must also fail for lack of a protected property interest.

The decision of the Court of Appeals properly rejected the Petitioner's constitutional claim of deprivation of property without just compensation. Manifestly, there is no important question of Federal law requiring decision by the Supreme Court on certiorari and, accordingly, the Petition should be denied.

ARGUMENT

I. No Conflict of Opinions among the United States Courts of Appeal of the Different Circuits as to the Extent of a Depositors' Protected Rights or Interests in a Federal Mutual Savings and Loan Association under the Fifth Amendment to the Constitution of the United States.

The Petitioner asserts that the Court of Appeals for the Fourth Circuit's decision in the matter before this Court is contrary to the cited decisions (Petition, at pages 7-8) of the Courts of Appeals for the Sixth and Seventh Circuits in the Fourth Circuit's conclusion:

> Thus, it is apparent that depositors will not be deprived of property rights by conversion to a federal stock organization. Depositors' only actual rights, their rights as creditors of the association, will remain unchanged by the conversion.

While the decisions cited by the Petitioner are pertinent to an analysis of the distinguishing characteristics of a mutual depositor's (creditor/stockholder) relationship to the mutual association, on the particular matters at issue, these rulings do not pass directly upon the question of whether or not the depositor of a mutual savings and loan association has a protected property interest in voting rights or in the net worth of a federal mutual savings and loan association subject to the protective safeguards afforded under the Fifth Amendment to the Constitution. Accordingly, there is no conflict of decision between the Courts of Appeals of the Sixth and Seventh Circuits and the Fourth Circuit's decision now before this Court that

the conversion does not deprive the Petitioner of any protected property interest under the Fifth Amendment.

The Petitioner suggests that his depositor status to First Federal is like that of a stockholder and this is further amplified by the Congressional enactment of the Depository Institutions Deregulation Monetary Control Act of 1980. PUB. L. 96-221, 94 Stat. 132. By this enactment, he urges (Petition, at pages 14-15) that the planned phase-out of interest rate controls under Regulation Q over a period of six years provides a "reasonable expectation" that such will be done and thereby confers to mutual depositors a type of unrestricted interest in the remaining surplus of a savings and loan association after provision for loss reserves. In all candor, it is difficult to see how this legislative development and the prospective possibility of a phase-out of interest rate controls has any bearing on the Petitioner's deprivation of property claim. Significantly, any elimination of interest rate controls will inure to the Petitioner's benefit if he chooses to remain a depositor in First Federal. Accordingly, this prospective advantage should not be considered as an addition to the spectrum of interests which are advanced as distinguishing characteristics of the debt (creditor) or equity (stockholder) interest of a depositor in a mutual savings and loan association. As noted above, the existence or weight to be given the contrasting characteristics of a creditor/stockholder status are not determinative on the question of the Petitioner's claim of a protected property interest under the Fifth Amendment.

II. No Important Question of Federal Law has been Raised by the Petitioner in Challenging the Legality of the Conversion of First Federal Savings and Loan Association of Raleigh from a Federal Mutual to Stock Form of Savings and Loan Association.

A. The Indirect Economic Impact of Conversion is not Subject to Judicial Scrutiny.

In support of the Petitioner's position before this Court, he urges that the decision of the Court of Appeals could have the effect "of throwing the status of the ownership of most or all mutual-type institutions into doubt." (Petition, at page 4.) He further asserts that if the decision of the Court of Appeals could be restricted to the savings and loan industry "the results would be sweeping." (Petition, at pages 16-17.) Essentially, through the claim of a protected property interest under the Fifth Amendment, he seeks to frustrate the will of the Congress, which has authorized the conversion of a federal mutual-type savings and loan association to stock form. As correctly noted in the opinion of the Court of Appeals, these are "policy arguments" and are "more suitable addressed to a legislative body."

The legitimacy of mutual-type institutions, and specifically the conversion of a federally chartered mutual savings and loan association to stock form, is not a proper subject of judicial concern. It is settled that economic legislation involving policy matters and, particularly, as applied to the wisdom of federal legislation (12 C.F.R. 1725(j)) authorizing the conversion of federal mutual savings and loan associations to a stock form of federally chartered

savings and loan association, are matters best left for decision by the Congress.[3]

B. The Petitioner, as a Member/Depositor of First Federal, has not been Deprived of any Significant Property Interest by Reason of the Conversion.

In both judicial proceedings[4] initiated by the Petitioner attacking the conversion, and before this Court, the Petitioner asserts a deprivation claim "without just compensation" contrary to the Fifth Amendment. While the Fifth Amendment forbids the taking of property for public use without just compensation, this prohibition refers only to a direct governmental appropriation of an individual's property.[5] Absent such a taking, there can be no exercise of the judicial function of awarding compensation.

Undeniably, the Petitioner has raised a deprivation of property claim under the Fifth Amendment which necessarily revolves around the federal government's regulatory control over a federally chartered savings and loan association. Assuming, arguendo, the Petitioner has properly presented a due process claim under the Fifth Amendment, it is clear that he has not been deprived of a significant prop-

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[3]East New York Sav. Bank v. Hahn, 326 U.S. 230, 66 S.Ct. 69, 90 L.Ed. 34 (1945); Home Building and Loan Association v. Blaisdell, 90 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413 (1934); Kargman v. Sullivan, 582 F. 2d 131 (1st Cir., 1978).

[4]See note 2, supra.

[5]O'Bannon v. Town Court Nursing Center, . . . U.S. . . . , 100 S.Ct. 2467, . . . L.Ed. . . . (1980); Public Service Commission of Montana v. Great Northern Utilities Co., 289 U.S. 130, 53 S.Ct. 546, 77 L.Ed. 1080 (1933); Laycock v. Kenny, 270 F. 2d 580, (9th Cir., 1959), cert. denied, 361 U.S. 933, 80 S.Ct. 373, 4 L.Ed. 2d 355 (1960).

erty interest entitled to due process protection. Alternatively, if such a property interest exists adequate procedural safeguards were provided in connection with the conversion of First Federal from a federal mutual to stock form of association.

The test of a recognizable property interest entitled to due process protection was stated in *Board of Regents of State Colleges* v. *Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed. 2d 507 (1972) as follows:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

From the inception of the Petitioner's status as a member/depositor of First Federal, it was subordinate to the applicable Federal law, regulations, charter and by-law provisions pursuant to which First Federal was organized and operated. Here, the Petitioner, as a single depositor of First Federal, seeks to frustrate the authority of the Congress and the administrative action of the FHLBB and FSLIC approving a change of the form in which the savings and loan business of First Federal is conducted. The effect of the conversion, both *dejure* and in fact, involves a single entity-type restructuring of corporate form and nothing else. The fact of conversion does not deny to the Petitioner the right, if he elects to do so, to continue his depositor relationship in the same and uninterrupted business as First Federal was engaged prior to the conversion. This change in form simply terminates his membership status and the incidental voting privilege accorded to such status under the applicable Federal law.

The Petitioner's claim of deprivation of a property interest protected under the Fifth Amendment arises out of the very procedural limitations as existed at the very source of his claim, including the reserved right of amendment of the laws under which First Federal is formed, the regulations issued thereunder, and the charter and by-law provisions under which it operates. The Petitioner's only claim of statutory entitlement to a share in the net worth of First Federal arises only in the unlikely event of its complete liquidation. Under the reasoning of *Roth, supra,* he has only a "unilateral expectation" prior to a complete liquidation. Thus, in a constitutional sense, the Petitioner in this aspect is not deprived of any protected property interest by reason of the conversion.

While the cited dicta statement (Petition, at page 9) of the Supreme Court in *Society for Savings* v. *Bowers* (349 U.S. 143 (1955)) may have been relied on by the Court of Appeals in reaching its conclusion that the depositors "will not be deprived of property rights by conversion", such statement was properly evaluated and considered by that Court if for no other reason than to reflect the insignificant nature of the depositors' contingent ownership interest in a mutual savings and loan association.

The Federal law authorizing the conversion, the implementing conversion regulations and the adopted Plan of Conversion overwhelmingly approved by First Federal's members provide by charter amendment (Charter S) for the termination of Petitioner's membership status in First Federal with voting rights limited to the stockholders of First Federal in its converted form. The Petitioner's isolated loss of voting rights, in actuality, is *de minimis* and is not subject to absolute protection under the Fifth Amendment.

III. The Conversion Regulations are Reasonable and Have a Rational Basis in the Implementation of a Legitimate Public Interest; Provide Adequate Safeguards for the Protection of the Interest of Mutual Depositors; and are Valid under the Fifth Amendment to the Constitution of the United States.

The Congress has provided for the conversion of Federal mutual savings and loan associations to Federal stock savings and loan associations while retaining their charters. Section 1725, specifically (and the referenced Section 1464, generally) confers on the FHLBB, directly and as the operating head of the FSLIC, the broad rule making authority to promulgate regulations in the accomplishment of this objective. Section 1725j(4) expressly provides that in the granting of conversion approvals, the FHLBB will consider certain standards in order to achieve, among others

(C) an appropriate distribution between State chartered and Federally chartered entities;

(F) the meeting of capital needs; and

(G) such other reasonable results as it may consider necessary or appropriate in the public interest.

Under the conversion regulations (12 C.F.R. Section 563b.1(3)), the FSLIC made specific findings in order to protect against the declared undesirable results of providing for a distribution to the accountholders of a converting mutual insured institution and the creation of strong incentives for significant shifts of savings funds among insured institutions thereby unacceptably threatening their financial stability (the referenced "windfall distribution"). The FSLIC then concluded that the right to share in the

"liquidation account" in the event of a subsequent liquidation of a converting association is designed

> . . . virtually to eliminate the "windfall" aspect of conversion and the resulting disruptive effect on the economy. Accordingly, the Board finds that these regulations provide a means by which mutual insured institutions may convert to stock form on an equitable basis.

The conversion regulations provide adequate safeguards for the protection of the interests of First Federal's depositors. The conversion may only be effected after publication of notice with opportunity to file written objection with the FHLBB to the conversion[6], the solicitation of the votes of eligible members in support of the conversion under proxy materials filed with the FHLBB[7] and the express condition that the conversion receive not only the required administrative approval but also the approval of First Federal's members by a majority of votes eligible to be cast[8]. In addition to these procedural requirements, the conversion regulations further provide a substitution of the depositors' inchoate interests in the surplus of the converting association for an equally inchoate interest in the post-conversion "liquidation account" established for their benefit[9]. Also, the depositors are given first priority to purchase capital stock in the converted association in accordance with prescribed formulae[10]. The conversion reg-

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[6]12 C.F.R. 563b.4.

[7]12 C.F.R. 563b.5.

[8]12 C.F.R. 563b.6.

[9]12 C.F.R. 563b.3(f).

[10]12 C.F.R. 563b.3(c).

ulations are clearly an appropriate means to a legitimate legislative end and have a reasonable and rational relationship to the purpose intended by the Congress pursuant to the authority conferred under the applicable provisions of the Home Owners' Loan Act of 1933, as amended.

In sum, the Petitioner has not suffered a taking or deprivation of any protected property interest under the Fifth Amendment as a consequence of First Federal's conversion from mutual to stock form. His fundamental proprietary interest, viz., his deposit account and the withdrawable rights thereunder, remain intact and unimpaired. The incidental right to vote which the Petitioner lost as a result of the conversion is not such an interest as would preclude either a modification or denial of such right under the Fifth Amendment.

The Petitioner's claim of a deprivation of property rights is directed to the indirect effects which have resulted from the implementation of governmental policy in respect of the regulation of a vital segment of those financial institutions created, organized and operated under Federal law. The Congressional determination to permit the conversion of federal savings and loan associations from a mutual to stock form is not destitute of basis or so arbitrary or capricious as to place the legislation and the conversion regulations of the FSLIC beyond the constitutional authority of the Congress.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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November 14, 1980